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No. 84-1716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OWEN WILSON, *et al.*,
Petitioners,

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners may relitigate in federal courts the same factual issues finally resolved against them in extensive evidentiary hearings by the Maryland Insurance Commissioner and on appeals dismissed by the Maryland state courts.

2. Whether petitioners have standing, as alleged owners or former officers of an insurance company, to prosecute a federal antitrust action alleging that the public has been injured by a contract of reinsurance, approved by the Maryland Insurance Commissioner, between their company and another.

3. If petitioners may relitigate the factual issues, and have standing, whether a contract of reinsurance approved by the Maryland Insurance Commissioner under state laws extensively regulating such insurance transactions is exempted from the federal antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

STATEMENT PURSUANT TO RULE 28.1

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries and affiliates of respondent North Carolina Mutual Life Insurance Company:

Mid-West Underwriters, Inc.
American Citizens Life Insurance Company, Inc.
American Capital Life Insurance Company
NCM Life Communications
Nashville Television, Inc.
Charlotte Broadcasting Company
Holly Hill Cablevision, Inc.
St. George Cablevision, Inc.

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BRIEF FOR RESPONDENTS IN OPPOSITION

RELATED PROCEEDINGS AND JUDGMENTS BELOW

The petition does not accurately reflect the eight-year procedural history of this litigation, which is marked by petitioner Owen Wilson's persistent opposition to a reinsurance contract between North Carolina Mutual Life Insurance Company ("North Carolina") and Mutual Benefit Society of Baltimore ("Mutual").

The Maryland Litigation

Wilson, a former officer, director and policyholder of Mutual, first opposed the contract in protracted hearings before the Maryland Insurance Commissioner ("MIC"). The MIC approved the reinsurance transaction seven years ago in a comprehensive 48-page written decision. *In Re: Approval of a Contract and Agreement of Reinsurance of the Mutual Benefit Society of Baltimore City*

(Case No. 1960, decided June 5, 1978) (cited hereinafter as "MIC Order").[1] The Baltimore City Court dismissed Owen Wilson's appeal, the Maryland Special Court of Appeals affirmed the dismissal, and the highest court in Maryland denied certiorari. *Wilson* v. *Insurance Commissioner of the State of Maryland*, No. 24-P, File No. 101580, Balt. City Ct. (November 9, 1978), *aff'd*, No. 1237, Court of Sp. App. (June 14, 1979), *cert. denied*, No. 217, Maryland Court of Appeals (September 10, 1979).[2]

The Federal Litigation

Petitioner Wilson and others commenced these proceedings in November 1980, seeking to set aside the reinsurance transaction based on federal securities, civil rights, antitrust and state law theories. On June 30, 1983, the United States District Court for the District of Columbia dismissed the action and entered judgment for respondents. (Petition, Appendix A, pp. 23-24.) The United States Court of Appeals for the District of Columbia Circuit affirmed without opinion in a judgment filed on October 29, 1984. (Petition, Appendix B, pp. 25-26.)

STATUTES INVOLVED

Pertinent provisions of the Maryland Insurance Code as they existed in 1978 are included in the appendix to this brief. *See* pp. 1a-6a, *infra*.

COUNTERSTATEMENT OF THE CASE

Mutual is a small, Baltimore-based mutual insurance company operating only in the state of Maryland. (MIC Order at 3.) In 1977, Mutual was in financial difficulty,

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[1] The MIC Order was submitted to the district court and also was included as a separate appendix to respondents' brief to the court of appeals.

[2] The District of Columbia Superintendent of Insurance also examined and approved the reinsurance transaction to the extent it affected a subsidiary of Mutual located in the District of Columbia. *In Re: American Citizens Life Insurance Corporation* (Order 77-26, decided May 13, 1977).

having sustained operating losses and suffered a shrinking surplus for eight of the nine preceding years. (*Id.* at 12.) With petitioner Owen Wilson and his daughter the only dissenting directors, Mutual's Board voted 7-2 to enter into a contract of reinsurance under which North Carolina would assume Mutual's insurance policy liabilities and assets. (*Id.* at 1, 16.)[3] North Carolina, a large and stable insurance company with an "excellent reputation," possessed the financial strength to shoulder Mutual's mounting liabilities and protect its policyholders. (*Id.* at 7-9, 42.)

Maryland, like virtually all states, pervasively regulates the insurance business through an administrative agency—the MIC—specializing in that industry. Under the Maryland Insurance Code, 48-A Md. Code § 274, the proposed reinsurance transaction could only be consummated in accordance with statutory procedures requiring (i) approval of Mutual's policyholders; and (ii) the MIC's authorization, following evidentiary hearings establishing that the transaction complied with applicable law, provided adequate protection to Mutual's policyholders, and was fair to Mutual.

Proceedings Before the MIC

In accordance with procedures supervised by the MIC, an independent mailing firm sent proxy materials to the 22,000 policyholders of Mutual. (MIC Order at 16.) The materials included petitioner Owen Wilson's written statement of reasons why he objected to the transaction and his recommendation that policyholders vote against it. (*Id.* at 17.) More than 80 percent of the responding policyholders voted in favor of the reinsurance transaction. (*Id.*)

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[3] Petitioners persist in terming the transaction a "merger." They made the same argument to the MIC, which rejected it. (MIC Order at 20.) The fact is, as the complaint recognizes (Complaint, ¶ 7), that Mutual continues in existence. *See* p. 15, *infra*.

The MIC then heard testimony on the reinsurance transaction during many days of hearings in October, November and December 1977. By law, the proceedings are "quasi-judicial" in nature and petitioners had the right to subpoena witnesses, to present evidence and to cross-examine opposing witnesses. 48-A Md. Code §§ 38-39. Further hearings were held in May 1978 to enable Owen Wilson and others to present additional opposition evidence. The hearings were convened only after "due notice [was] given" by both newspaper notice and mail to interested parties. (MIC Order at 4.) The "hearings were well attended and the chief participants were represented by able and experienced counsel." (*Id.*)[4] The MIC delayed its decision for nearly five months in order to schedule additional evidentiary hearings requested by Owen Wilson's counsel. (*Id.* at 41.)

The MIC's Decision

Owen Wilson and other petitioners raised the same objections before the MIC that they later sought to relitigate below. The MIC rejected each of the contentions in a 48-page decision which the district court rightly characterized as "detailed."

Thus, in accordance with the reinsurance provisions of 48-A Md. Code § 274, the MIC concluded, *inter alia*, that (1) the rights of Mutual policyholders "are amply protected under the [reinsurance] agreement" (MIC Order at 42); (2) the transaction is "fair and equitable to Mutual" (*id.* at 43); and (3) the transaction had been duly approved by many more than the required two-thirds of voting policyholders. (*Id.* at 42-43.)[5] The MIC

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[4] The MIC noted that petitioner Owen Wilson was personally responsible for "most of the opposition to the proposal. . . ." (MIC Order at 18.) Owen Wilson filed nine petitions opposing the transaction (*id.* at 44-45) but "he declined to accept an invitation of the Insurance Commissioner to testify" at the hearings. (*Id.* at 18.)

[5] The MIC also explored in detail—and rejected—contentions that the proxy materials sent to policyholders had been misleading or

also considered and rejected Owen Wilson's contentions that the reinsurance transaction would violate the antitrust/fair trade practice provisions of the Maryland Insurance Code, 48-A Md. Code §§ 220, 229; after analyzing the evidence, the MIC concluded that North Carolina would have only a trivial share of the business within the pertinent markets and that the transaction would certainly not "create a monopoly or lessen competition in any measurable degree." (MIC Order at 29-31.)

Only petitioner Owen Wilson sought to appeal the MIC's decision under the exclusive statutory judicial review procedure. 48-A Md. Code § 40. His appeal was dismissed for failure to comply with the rules and procedures for appeals; the dismissal was upheld by the Maryland Court of Special Appeals and certiorari was denied by the Maryland Court of Appeals. (*See* pp. 1-2, *supra.*)

The Commencement of the Federal Litigation

In late 1980—more than two years after the MIC's decision—petitioners commenced this litigation. The complaint chiefly challenged the reinsurance transaction as a "conspiracy" among defendants to obtain assets of Mutual for unfairly low consideration. It also alleged that the transaction violated federal securities, civil rights and antitrust statutes. The complaint sought equitable relief nullifying the reinsurance transaction and prayed for damages. (Complaint, ¶¶ 60-69.)

The petition for certiorari abandons all but the antitrust theories. The complaint alleged that the reinsurance transaction violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by reducing competition among insurance companies. (Complaint, ¶¶ 15-33.) The complaint does not allege that plaintiffs (*i.e.*, petitioners) suffered any

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otherwise inadequate. (MIC Order, 18-23.) Similarly, the MIC found no basis for assertions that there were any "improper corporate acts" undertaken in connection with the authorization and approval of the reinsurance transaction. (*Id.* at 32.)

antitrust injury; rather, it asserts that "the insurance purchasing public in this line of commerce has been denied the benefits of free and open competition." (Complaint, ¶ 32.) Plaintiffs sought relief for themselves on the different theory that they are "policyholders who are the owners of Mutual" and that the reinsurance transaction diminished, or deprived them of, the value of their alleged ownership interests. (Complaint, ¶¶ 1, 29-32, 59-60.)

REASONS FOR DENYING THE WRIT

Far from meeting the requirement of Rule 17.1 that there be "special and important reasons" for review by certiorari of the decision below, this case was properly disposed of by settled and noncontroversial principles. The petition does not and could not cite any conflict between the decision below and decisions of this Court, federal courts of appeal or any state courts.

First, petitioners' "antitrust" claims were nothing more than an effort to dress as a "federal" cause of action the identical competitive evidence and arguments they had unsuccessfully presented to the MIC. The MIC expressly found that the transaction would have no appreciable effect on competition within Maryland—Mutual's *only* market. Maryland law does not permit collateral attacks on the MIC's findings and conclusions. Under 28 U.S.C. § 1738 and decisions of this Court, petitioners cannot relitigate these factual issues simply by recasting them as federal claims.

Second, another fatal flaw in petitioners' "antitrust" claims is their lack of standing to assert them. They brought suit to vindicate injury to their alleged ownership interests in Mutual. The only "antitrust injury" alleged in the complaint is harm the general public might suffer from asserted reductions in competition. There is no allegation that any petitioner has suffered "antitrust injury" and it is clear that, under settled principles, pe-

titioners have no standing to litigate some generalized public interest in unspecified "competition."

Third, petitioners' bewildering discussion of the impact of the McCarran-Ferguson Act upon health care and health insurance is irrelevant to this case, and seems designed to distract attention from the dispositive standing and relitigation obstacles to their antitrust claims. The only McCarran-Ferguson Act issue raised below was the district court's alternative finding that detailed state regulation of the reinsurance contract in the interests of policyholders qualified for McCarran-Ferguson exemption. The only other court that has considered this question decided it in the same way.

I. PETITIONERS' EFFORTS TO RELITIGATE THE ISSUES

The district court held, *inter alia*, that petitioners' complaint "represents a meritless collateral attack upon the findings and conclusions issued by the [MIC]." (Petition, p. 24.) This is indeed a paradigm case for application of "*res judicata* and collateral estoppel [to] relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).

Petitioners seek to relitigate the final approval of a long-consummated transaction affecting the rights of thousands of former Mutual policyholders. Maryland has found that the "complex problems" of insurance can be resolved "more expeditiously, effectively, cheaply and simply" by confiding them to an agency having "expertise and superior ability." *State Ins. Comm'r* v. *Nat'l Bureau of Casualty Underwriters*, 248 Md. 292, 236 A.2d 282, 286 (1967). To this end, Maryland's Insurance Code requires persons aggrieved by any decision of the MIC to present their opposition in an exclusive statutory appeal

process. 48-A Md. Code § 40. Petitioners could have challenged all aspects of the MIC's decision and even introduced additional evidence. *Id.*, § 40(4). Only Owen Wilson appealed. But his failure to do so in timely fashion resulted in dismissal, which was upheld by the Maryland appellate courts.

Maryland law requires parties aggrieved by administrative decisions to make use of the exclusive statutory appeal procedure and forbids collateral attacks through other forms of action. *Lawrence N. Brandt, Inc.* v. *Montgomery County Comm'n on Landlord-Tenant Affairs*, 39 Md. App. 147, 383 A.2d 688, 693-95, (1978); *Fertitta* v. *Brown*, 252 Md. 594, 251 A.2d 212 (1969); *see also, Ohio Casualty Ins. Co.* v. *Insurance Commissioner*, 39 Md. App. 547, 387 A.2d 622 (1978). Moreover, Maryland embraces the standard rule of collateral estoppel under which "determinations of fact or issues actually litigated in the first case are conclusive in [the second]." *MPC, Inc.* v. *Kenny*, 279 Md. 29, 32, 367 A.2d 486, 489 (1977). Here, as in *Badders* v. *Uhler*, 233 Md. 441, 197 A.2d 120, *cert. denied*, 377 U.S. 958 (1964), the dismissal of petitioner Owen Wilson's appeal confirmed that the MIC's decision could no longer be challenged under Maryland law. Federal courts are obliged by 28 U.S.C. § 1738 to accord the final decision the same "full faith and credit" as would Maryland courts. *Marrese* v. *American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S.Ct. 1327 (decided March 4, 1985); *Allen* v. *McCurry*, *supra*, 449 U.S. at 96; *see also, Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

It is true that the MIC did not (and could not) assert jurisdiction over federal antitrust claims. But petitioner Owen Wilson himself injected competitive issues arising under state law into the MIC proceedings, and the MIC gave them detailed consideration. Its decision on these issues was governed by the identical statutory appeal procedures under 48-A Md. Code § 40.

The MIC's decision is clear and comprehensive on these points. Owen Wilson and others contended that the reinsurance transaction would " 'reduce competition in the industrial insurance business' " and urged that it be disapproved under antitrust/unfair trade practices provisions of the Maryland Code that are in terms substantially identical to the standards of the Clayton Act. (MIC Order, 28-29.)[6] The MIC conducted a detailed review of the markets in question, which were all within Maryland —the only state within which Mutual does business. (*Id.* at 3, 29-31.) Even under the definition of the market resulting in the highest post-transaction market share, the MIC found that Mutual's share of the market[7] was less than one percent, and that Mutual and North Carolina would together have less than two-and-one-half percent of the market if the reinsurance transaction were implemented. (*Id.* at 29.) The MIC also stressed that many other insurers in the market dwarfed Mutual and North Carolina. (*Id.* at 29-31.) Considering these and other pertinent facts, the MIC expressly found that the reinsurance transaction raised no conceivable competitive issue:

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[6] 48-A Md. Code § 229 prohibits acquisitions, common management or other transactions that would "substantially lessen competition generally in the insurance business or tend to create a monopoly therein." Section 220 likewise forbids acts or "agreements" that "result in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." The MIC has jurisdiction to enforce these provisions under Art. 48-A Md. Code §§ 215-16.

[7] The geographic market analyzed by the MIC was properly focused on Maryland, the only state in which Mutual is authorized to do business. (MIC Order, 3; Complaint ¶ 7.) Nor did the MIC make "extraterritorial" findings on competition. To the extent the stock of a small District of Columbia insurer was involved—American Citizens—the D.C. Superintendent of Insurance specifically found in a separate proceeding that the competitive standards of 35 D.C. Code § 1903(d)(1)(B) (1978) were satisfied. (*See* p. 2, n.2, *supra.*) That provision required a finding that the transaction would not "substantially lessen competition in insurance in the District or tend to create a monopoly therein."

> "Acquisition of Mutual Benefit by North Carolina would certainly not create a monopoly or tend to lessen competition in any measurable degree. The reason is simply that Mutual Benefit is such a very small factor in the total insurance market. This is true even in the specialized market in which Mutual Benefit operates." (*Id.* at 29.)

These findings, applying state-law competitive standards virtually identical to the Clayton Act standards raised anew by petitioners, necessarily foreclose relitigation of the issues. The federal courts' exclusive jurisdiction over Clayton Act cases does not permit petitioners to avoid the standard principles of collateral estoppel (or "issue preclusion") and Maryland law that forbid relitigation of the same factual issues in the guise of new, "federal" claims. *See, e.g., Azalea Drive-In Theatre* v. *Hanft*, 540 F.2d 713, 715 (4th Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306, 310 (2d Cir. 1912), *app. dismissed*, 235 U.S. 716 (1913); *see also, Marrese, supra*, 105 S.Ct. at 1332; *Becher* v. *Contoure Laboratories, Inc.*, 279 U.S. 388 (1929); *Kremer* v. *Chemical Construction Corp., supra*, 456 U.S. at 482 n.22. Since Maryland law forbids petitioners from attacking the MIC's findings in proceedings other than the statutory appeal procedures, they may not relitigate the same factual issues in a federal court.

II. PETITIONERS' LACK OF ANTITRUST STANDING

Private plaintiffs have standing to raise antitrust claims only when they suffer injury caused by anticompetitive effects of an activity prohibited by the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).[8] Petitioners have not complained

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[8] In *Brunswick*, this Court held:

> ". . . for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *anti-*

of injury sustained by monopolization or other anticompetitive conduct. Rather, they asserted that the reinsurance transaction unfairly deprived them of their full rights as alleged *owners* of Mutual. (Appellants' Court of Appeals Br. 10, 19-20; Complaint, ¶¶ 1, 29-32, 59-60).[9] Thus, petitioners sued as "policyholders who are owners of the Mutual Benefit Society of Baltimore." (Complaint, ¶ 1.) They sought treble damages based on the alleged diminution of their ownership interest in Mutual (Complaint, ¶ 60), and they equated their membership status in Mutual (a mutual corporation) with stockholder status in a stock corporation. (Appellants' Court of Appeals Br. 10.) *See Petition of Charlton Bros. Transp. Co.*, 30 A.2d 538 (Md. 1942).

Consistent with the rule of *Brunswick*, however, persons complaining of the impact of acquisitions upon their ownership interests generally have no standing to litigate competitive claims under Section 7 of the Clayton Act. *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1186-87 (10th Cir. 1983). *A fortiori*, stockholders do not have standing to bring a treble damage action or a suit for injunctive relief with respect to allegedly anticompetitive transactions affecting their corporation because "[i]t is well settled that a stockholder is not a person injured in his business or property within the meaning of the antitrust laws." *Kreager* v. *General Electric Co.*, 497 F.2d 468, 472 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1974). A legion of federal cases upholds these principles.[10]

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trust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489.

[9] The complaint alleges that the *general public* has suffered from the loss of competition, but does not allege that any plaintiff has been injured by that loss of competition. (Complaint, ¶¶ 32, 52-58.)

[10] Cases ruling that shareholders may not bring an antitrust suit when the value of their stock has been impaired include: In Re

Petitioner Owen Wilson also sought a separate award of damages in his capacity as "officer, director, policyholder [and] stockholder." (Complaint, ¶ 60.) He, too, alleged no "antitrust injury" within the meaning of *Brunswick*. The cases uniformly hold that directors and employees have no standing to raise antitrust claims because their injury is not "within that area of the economy which is endangered by a break down of competitive conditions in a particular industry." *Conference of Studio Unions* v. *Lowes, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Central National Bank* v. *Rainbolt, supra*, 720 F.2d at 1186.[11]

Industrial Gas Antitrust Litigation, 681 F.2d 514, 517-18 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983); Mayer Goldberg Inc. of Lorain v. Fisher Foods, Inc., 717 F.2d 290 (6th Cir. 1983); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Peter v. Western Newspaper Union, 200 F.2d 867, 872 (5th Cir. 1953); Peterson v. Borden Co., 50 F.2d 644, 645-46 (7th Cir. 1931); Ash v. International Business Machines, 353 F.2d 491. 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp., 211 F. Supp. 276 (S.D.N.Y. 1962).

Nor does a shareholder have standing under the antitrust laws when he has lost dividends or salaries. Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp., 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd on opinion below*, 113 F.2d 114 (2d Cir. 1940); Gerli v. Silk Assn. of America, 36 F.2d 959 (S.D.N.Y. 1929). Nor could a shareholder secure standing by alleging that he has been deprived of voting rights. National Supply Co. v. Hillman, 57 F. Supp. 4, 8 (W.D. Pa. 1944). *See also* Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 534 n.29 (1983), citing Ames v. American Telephone & Telegraph Co., 166 Fed. 820 (D. Mass. 1909) for the proposition that "a stockholder has no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiffs' stock worthless. Plaintiffs' claim was not distinguishable from any injury sustained by the company itself."

[11] *See also*, Gerli v. Silk Ass'n of America, *supra*, 36 F.2d at 960-61; Jeffrey v. Southwestern Bell, *supra*, 518 F.2d at 1131; Reibert v. Atlantic Richfield Co., *supra*, 471 F.2d at 731; Fein v. Security Banknote Co., 1957 CCH Trade Cas. ¶ 68,887 (S.D.N.Y. 1957).

Petitioners cannot acquire personal standing by alleging that "members of the insurance purchasing public have been denied the benefits of free and open competition in the market place." (Complaint, ¶ 32.) The most basic principle of standing is that a plaintiff must allege personal, concrete injury to *himself*. It is not sufficient to assert "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Here, there is no allegation that any petitioner was harmed by any reduced competition; to the contrary, the MIC specifically found that competition would not be affected and that the reinsurance transaction would preserve and protect appellants' interests as policyholders. (MIC Order, 29-31.) In fact, the Maryland Attorney General, whose responsibilities include protection of the "insurance purchasing public" in Maryland, urged below that petitioners' litigation should be dismissed. (Letter from Maryland Attorney General to District Court dated January 5, 1983.)

III. PETITIONERS' MCCARRAN-FERGUSON ACT CONTENTIONS

Petitioners contend, with scarcely any reference to the facts of this case, that the decisions below raise important questions of the applicability of the McCarran-Ferguson Act to programs seeking to contain health care costs. (Petition at 10-21.) The complaint focused entirely upon the life insurance business of the companies in defining an alleged market. (Complaint, ¶ 32.) There is no allegation whatsoever concerning health care cost containment issues and no such issues were ever raised below.

The McCarran-Ferguson Act is implicated only because the district court concluded that the case should be dismissed for the additional reason that the reinsurance transaction qualified for exemption under the Act. The Act provides that the Sherman and Clayton Acts shall be "applicable to the business of insurance" only "to the ex-

tent that such business is not regulated by state law." 15 U.S.C. § 1012(b). Here, the reinsurance transaction approved by the MIC met the literal requirements for exemption because it (1) embraced the "business of insurance" and (2) was regulated and approved under 48-A Md. Code § 274.

This Court has stressed that the "business of insurance" exempted by the McCarran-Ferguson Act is characterized by transactions: "transferring or spreading a policyholder's risk;" affecting the "policy relationship between the insurer and the insured;" and limited to "entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). The reinsurance contract at issue here reflects each of these aspects of the business of insurance. The underwriting risk was being transferred from Mutual to North Carolina, two "entities" within the insurance industry. In accordance with the express terms of 48-A Md. Code § 274, "the protection or service to [Mutual's] policyholders"—*i.e.*, preservation of their insurance policy rights—was a paramount issue to be reserved at the hearings. The very purpose of the transaction was to rescue policyholders from Mutual's continuing financial decline by substituting North Carolina for Mutual as insurer.

We are aware of only one other decision that considered whether regulated reinsurance transactions are exempt under the McCarran-Ferguson Act, and it concluded that such transactions fall squarely within the "business of insurance" for the purpose of invoking the exemption:

> ". . . [T]he ultimate purpose of the [reinsurance] agreement is to provide *reliable insurance* to policyholders. Consequently, the agreement between Amreco and Calvert constitutes the 'business of insurance' within the meaning of the McCarran-Ferguson Act." *American Mutual Reinsurance Co.* v. *Calvert Fire Insurance Co.*, 367 N.E.2d 104, 109 (Ill. App. 1977), *cert. denied*, 436 U.S. 906 (1978).

Petitioners cannot change the true character of the reinsurance transaction by arguing that its asset conveyance aspects make it a "merger." The MIC rejected the same argument when it was advanced by petitioner Owen Wilson, and Mutual in fact continues to exist as an independent entity. (MIC Order at 20; Complaint, ¶ 7.)

In recent years, there have been a number of decisions —particularly involving the health care industry—construing narrowly the McCarran-Ferguson Act exemption. *See, e.g., Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co.* v. *Pireno, supra*, 458 U.S. 119. To the extent that the petition really means to argue generally that the district court's alternative holding applied the exemption too broadly in view of these cases, no issue worthy of this Court's review is presented. The case was properly disposed of on the collateral estoppel and standing issues, so that McCarran-Ferguson Act questions are of purely academic interest. Even then, the exemption question depends on facts that are unique to this case, involves no important issues, and raises no conflict between the judgments below and decisions of other courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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MARYLAND INSURANCE CODE, ART. 48-A OF THE ANNOTATED CODE OF MARYLAND (1978):

§ 37. Notice of Hearing.

"Not less than ten (10) days in advance the Commissioner shall give notice of the time and place of the hearing, stating the matters to be considered thereat. If the persons to be given notice are not specified in the provision pursuant to which the hearing is held, the Commissioner shall give such notice to all persons directly affected by such hearing. In the event all persons directly affected are unknown, notice may be perfected by publication in a newspaper of general circulation in this State at least ten (10) days prior to such hearing."

§ 38. Hearing Procedure.

"(1) *Hearings to be Open to Public.*—Except as to filing made under subtitle 16 hearings shall be open to the public in accordance with the provisions of Article 41, § 14.

(2) *Right to Appear and Present Evidence, etc.*—The Commissioner shall allow any party to the hearing to appear in person and by counsel, to be present during the giving of all evidence, to have a reasonable opportunity to inspect all documentary evidence and to examine witnesses, to present evidence in support of his interest, and to have subpoenas issued by the Commissioner to compel attendance of witnesses and production of evidence in his behalf.

(3) *Intervention.*—The Commissioner shall permit to become a party to the hearing by intervention, if timely, any person who was not an original party thereto and whose pecuniary interests are to be directly and immediately affected by the Commissioner's order made upon the hearing.

(4) *Rules of Pleading and Evidence.*—Formal rules of pleading or evidence need not be observed at any hearing.

(5) *Record of Proceedings.*—Upon written request seasonably made by a party to the hearing and at such person's expense, the Commissioner shall cause a full stenographic record of the proceedings to be made by a competent reporter. If transcribed a copy of such stenographic record shall be furnished to any other party to such hearing at the request and expense of such other party. If no stenographic record is made or transcribed, the Commissioner shall prepare an adequate record of the evidence and of the proceedings."

§ 39. Order on Hearing.

"(1) In conducting any such hearing the Commissioner shall sit in a quasi-judicial capacity. Within thirty (30) days after termination of the hearing or of any rehearing thereof or reargument thereon, he shall make his order on hearing, covering matters involved in such hearing and in any rehearing or reargument thereof, and shall give a copy of such order to the same persons given notice of the hearing.

(2) The order shall contain a concise statement of the facts as found by the Commissioner, and of his conclusions therefrom, and the matters required by § 29.

(3) The order may affirm, modify, or nullify action theretofore taken or may constitute the taking of new action within the scope of the notice of the hearing."

§ 40. Appeals from Commissioner.

"(1) *Decisions Appealable; How and by Whom Appeal Taken; Parties; Jurisdiction.*—An appeal from the Commissioner shall be taken only from an order or hearing or with respect to a matter which the Commissioner has refused a hearing. Any person who was a party to such

hearing, or whose pecuniary interests are directly and immediately affected by any such order or refusal and who is aggrieved thereby may, within 30 days after (i) the order has been mailed or delivered to the persons entitled to receive it, or (ii) the Commissioner's order denying rehearing or reargument has been so mailed or delivered, or (iii) the Commissioner's refusal to grant a hearing, appeal from such order or hearing or such refusal of a hearing. The appeal shall be taken to the Baltimore City Court, by filing written notice of appeal in such court and by filing a copy of such notice with the Commissioner. However, in appeals from the suspension or revocation of the certificate of authority of a domestic insurer or of the license of an agent, broker, solicitor, adjuster, or adviser, the person taking the appeal at his option, in lieu of the Baltimore City Court, may take the appeal to the circuit court of the county of Maryland in which the insurer has its principal place of business or the licensee resides. An appeal taken pursuant to this subsection shall be captioned in the name of the person filing the appeal, as the party appellant, versus the Insurance Commissioner of the State of Maryland, as the party appellee. In all such appeals, the Commissioner shall be a necessary party appellee. In addition to the person filing the appeal and the Commissioner, any other person whose pecuniary interests are or may be directly and immediately affected by the matter on appeal, or who may be aggrieved thereby, upon application to the court, may be deemed an additional party appellant or appellee, as the court directs.

(2) *When Appeal to Operate as Stay.*—Upon filing of the notice of appeal therein the court shall have full jurisdiction, and shall determine whether such filing shall operate as a stay of the order or action from which an appeal is taken.

(3) *Record on Appeal.*—Within twenty (20) days after filing of the copy of the notice of appeal in his office, the

Commissioner shall make and return to the court in which the appeal is pending a copy of his order appealed from and a full and complete transcript, duly certified by the Commissioner, of the record upon which the order was issued, together with all exhibits and documentary evidence introduced thereat. If the appeal is from an action of the Commissioner with respect to which a hearing was refused, the Commissioner shall within such twenty (20) day period make and return to the court a full and complete transcript, duly certified by him, of all documents on file in his office directly relating to the matter as to which such appeal is taken.

(4) *Hearing de Novo.*—Upon receipt of such transcripts and evidence the court shall hear the matter de novo as soon as reasonably possible thereafter. Upon the hearing of the appeal the court shall consider the evidence contained in the transcript, exhibits, and documents therein filed by the Commissioner, together with such addiional evidence as may be offered by any party to the appeal.

(5) *Judgment.*—The court may affirm the decision of the Commissioner or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(i) In violation of constitutional provisions; or

(ii) In excess of the statutory authority or jurisdiction of the Commissioner; or

(iii) Made upon unlawful procedure; or

(iv) Affected by other error of law; or

(v) Unsupported by competent, materia, and substantial evidence in view of the entire record as submitted: or

(vi) Against the weight of competent, material and substantial evidence in view of the entire record, as sub-

mitted by the Commissioner and including de novo evidence taken in open court; or

(vii) Unsupported by the entire record, as submitted by the Commissioner and including de novo evidence taken in open court; or

(viii) Arbitrary or capricious.

(6) *Costs.*—Costs shall be awarded as in civil actions.

(7) *Appeal to Court of Special Appeals.*—Appeal by any party appellant or party appellee including the Commissioner may be taken to the Court of Special Appeals from the judgment of the Baltimore City Court or circuit court of the county, as in other civil cases. A stay of the effectiveness of any such judgment may be made only by order of court upon the giving of such security as the court deems proper."

§ 229. Interlocking Ownership or Management.

"(a) Any insurer may retain, invest in or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition or common management is inconsistent with any other provision of this article, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business or tends to create a monopoly therein.

(b) Any person otherwise qualified may be director of two or more insurers which are competitors, unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly."

§ 274. Bulk Reinsurance—Mutual Insurers.

"(a) *Authorized; Agreement to be Filed With and Approved by Commissioner.*—A domestic mutual insurer may

reinsure all or substantially all its business in force or all or substantially all of a major class thereof, with another insurer, stock or mutual, by an agreement of bulk reinsurance after compliance with this section. No such agreement shall become effective unless filed with the Commissioner and approved by him in writing after a hearing thereon.

(b) *Approval or Disapproval by Commissioner; Notice of Disapproval.*—The Commissioner shall approve such agreement within a reasonable time after filing if he finds it to be fair and equitable to each domestic insurer involved, and that such reinsurance if effectuated would not substantially reduce the protection or service to its policyholders. If the Commissioner does not so approve, he shall so notify each insurer involved in writing specifying his reasons therefor.

(c) *Submission of Plan and Agreement to Vote of Members.*—The plan and agreement for such reinsurance must be approved by vote of not less than two thirds of each domestic mutual insurer's members voting thereon at meetings of members called for the purpose, pursuant to such reasonable notice and procedure as the Commissioner may approve. If a life insurer, right to vote may be limited to members whose policies are other than term or group policies, and have been in effect for more than one year.

(d) *Reinsurance of Mutual Insurer in Stock Insurer.*—If for reinsurance of a mutual insurer in a stock insurer, the agreement must provide for payment in cash to each member of the insurer entitled thereto as upon conversion of such insurer pursuant to § 270, of his equity in the business reinsured as determined under a fair formula approved by the Commissioner, which equity shall be based upon such member's equity in the reserves, assets (whether or not 'admitted' assets), and surplus, if any, of the mutual insurer to be taken over by the stock insurer."